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NO. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1980

NORA FAYE JOHNSON,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	1
OPINIONS DELIVERED IN COURTS BELOW	2
STATEMENT ON THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED	2
STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTION PRESENTED	5
ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI	10
CERTIFICATE OF SERVICE	21
APPENDIX A	1A-16A
Opinion Delivered by the Court Whose Decision is Sought to be Reviewed	
APPENDIX B	1B-22B
Opinion of Court Below	
APPENDIX C	1C-2C
Decision on Rehearing	

TABLE OF AUTHORITIES

Cases: Page

BROOKS v. UNITED STATES, 337 U.S. 49 (1949).....10, 15

FERES v. UNITED STATES, 340 U.S. 135 (1950)..... 1, 12, 15, 18

STENCEL AERO ENGINEERING CORP. v. UNITED STATES, 431 U.S. 666 (1977).....14, 18

UNITED STATES v. BROOKS, 169 F.2d 840 (4th Cir. 1948).....10

UNITED STATES v. BROWN, 348 U.S. 110 (1954).....13

UNITED STATES v. REID, 251 F.2d 691 (5th Cir. 1958).....16

Other Authorities:

Title 28 U.S.C.A. § 1254..... 2

Title 28 U.S.C.A. § 2671..... 3

Title 28 U.S.C.A. § 2674..... 4

QUESTION PRESENTED FOR REVIEW

The question presented for review is whether the widow of a serviceman in the service who was killed (suicide) while on leave as a result of the negligence of agents of the United States while performing their duties as such agents of the United States Government is prevented from bringing a suit on her behalf and on behalf of her two children by virtue of the decision in Feres v. United States, 340 U.S. 135 (1950).

OPINIONS DELIVERED IN COURTS BELOW

1. Nora Faye Johnson v. United States, No. 71-922-Civ-J-C (M.D. Fla., filed January 18, 1979); and

2. Johnson v. United States, 631 F.2d 34 (5th Cir. 1980).

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. Date of judgment sought to be reviewed: November 17, 1980.

2. Date of order denying petition for rehearing en banc: January 6, 1981.

3. Statutory provision conferring jurisdiction on this Court to review the judgment in question by writ of certiorari: Title 28, U.S.C.A., Section 1254.

4. Statutes of the United States which this case involves are set out as follows:

(a) Title 28 U.S.C.A., Section 2671:

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term 'Federal agency' includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

'Employee of the goverment' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without

compensation.

'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty.

As amended July 18, 1966, Pub.L.89-506, § 8, 80 Stat. 307.

(b) Title 28 U.S.C.A., Section 2674:

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or

has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c.646, 62 Stat. 983.

STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTION PRESENTED

On November 16, 1971, Petitioner filed a complaint (Case No.71-922-Civ-J-T, M.D. Fla.) against Respondent United States of America pursuant to the Federal Tort Claims Act, 28 U.S.C., Sections 1346(b) and 2671, et seq. Petitioner brought said action on her behalf as the surviving spouse of

Sergeant Jimmy Ray Johnson, her husband, and on behalf of her two minor children for damages resulting from the wrongful death of Sergeant Jimmy Ray Johnson as a result of the alleged negligence of the Respondent.

Respondent filed its answer to Petitioner's complaint on February 16, 1972.

On August 15, 1974, Respondent moved for dismissal of the instant case or in the alternative for a judgment on the record.

On August 31, 1978, the Court heard argument of counsel on Respondent's motion to dismiss on the ground that Petitioner's motion was barred by the application of the Feres doctrine.

On January 18, 1979, the Court entered its order and memorandum opinion granting Respondent's motion to

dismiss and dismissed the case.

On February 14, 1979, Petitioner filed her notice of appeal from said order and memorandum opinion.

On November 17, 1980, the United States Court of Appeals for the Fifth Circuit rendered its decision affirming the order of the district court dismissing the Petitioner's action.

On December 15, 1980, Petitioner filed a petition for rehearing en banc in the United States Court of Appeals for the Fifth Circuit.

On January 6, 1981, the United States Court of Appeals for the Fifth Circuit entered its order denying the Petitioner's petition for rehearing en banc.

The pertinent facts material to a consideration of the question presented are as follows:

On January 25, 1971, Sergeant Jimmy Ray Johnson, while on active duty in the Army at Fort Stewart, Georiga, requested and was granted leave so that he could attend to his personal domestic affairs.

Sergeant Johnson had been hospitalized at Fort Stewart for a condition diagnosed as paranoid-schizophrenia with homicidal and suicidal tendencies and had been released from the hospital on January 21, 1971, without restrictions of any kind.

The parties have stipulated that Sergeant Johnson was negligently released from the hospital and further was negligently granted leave by his superior on January 25, 1971, which negligence was the proximate cause of his subsequent death.

On January 27, 1971, Sergeant

Johnson, while on leave from the Army, proceeded to the home of his brother-in-law some eighty miles from the base at Fort Stewart and while there proceeded to shoot and kill his brother-in-law, shot his wife, and then committed suicide.

ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI

The decision of the Fifth Circuit below has construed the Federal Tort Claims Act ("FTCA") in a way that conflicts with the prior decision of this Court in Brooks v. United States, 337 U.S. 49 (1949).

A. The Cases.

To understand the full import of the Brooks case as decided by this Supreme Court, it is essential to read the dissenting opinion of Judge Parker in United States v. Brooks, 169 F.2d 840 (4th Cir. 1948) as the Supreme Court in reversing the Fourth Circuit decision specifically held:

> We agree with Judge Parker. The Statute's terms are clear. *** We are not persuaded that "any claim" means "any claim but that of servicemen." ***

> . . . When H.R. 181 was incorporated into the Legislative Reorganization Act, the last vestige of the exclusion for members of the armed forces disappeared. 337 U.S. at 51-52.

In the decision below, Judge Parker contended that the servicemen in that case were entitled to the protection of the FTCA just as a civilian would be, explaining:

> It is urged that, if the act is construed to cover claims of military and naval personnel, it will result in a flood of litigation and disrupt discipline in the army and navy; but, even if this be true, the language of the act, being clear as it is, the matter is one for Congress and not for the courts. . . . It is true, of course, that statutes are to receive a reasonable construction and that, in determining the legislative intent, exceptions are to be read into their language to avoid injustice, oppression or absurd consequences. [Citing cases]. In this case, however, it can well be argued that more injustice and absurd consequences would result from the exception than from its omission. Congress evidently thought so when it omitted the exception contained in the text of H.R. 181 when adopting the text of that bill as the Tort Claims Act. 169 F.2d at 850-51.

This Court, in agreeing with Judge Parker's dissent, could not have used stronger or more explicit language in holding that the members of the armed forces were not excluded from the provisions of the FTCA.

Feres v. United States, 340 U.S. 135 (1950) did not attempt to reverse Brooks, but distinguished on a factual basis between Brooks and Feres and gave the following explanation:

> The actual holding in the Brooks Case can support liability here only by ignoring the vital distinction there stated. The injury to Brooks did not arise out of or in the course of military duty. Brooks was on furlough driving along the highway, under compulsion of no orders or duty and on no military mission. A Government-owned and operated vehicle collided with him. Brooks' father, riding in the same car, recovered for his injuries and the Government did not further contest the judgment but contended that there could be no liability to the sons, solely because they were in the Army. This Court rejected the contention, primarily because Brooks' relationship while on leave was not analogous to that of a

soldier injured while performing duties under orders. Id. at 146.

It was made abundantly clear that the application of Feres or Brooks rationale depends upon the facts of each particular case presented to the courts. In Brooks, a soldier who was in active service in the Army, but on leave at the time of his injury and off the premises of any military installation, was allowed to recover under the FTCA. On the other hand, in Feres, servicemen injured while in active service in the military and not on leave and while on the premises of a military installation were denied recovery. Finally, in United States v. Brown, 348 U.S. 110 (1954), a veteran who received an injury while in active service in the military and who after discharge received negligent medical treatment in a governmental hospital to which he was admitted by

reason of his prior active service, was allowed recovery as in Brooks.

Most recently, in Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977), the Court summarized what policies justified the application of Feres to injuries arising out of activity incident to military service, i.e., (1) the distinctively federal character of the Armed Forces requiring the uniform treatment of servicemen with regard to their rights under the FTCA, (2) the availability of compensation under the Veterans' Benefits Act, and (3) the peculiar and special relationship of the soldier to his superiors and the effects of the maintenance of servicemen's suits on discipline and the overall military system. Id. at 671-72. In Stencel, a defendant to a serviceman's personal injury suit sought indemnity against the Government for any sums it

would be required to pay to the serviceman. The Court held that since the serviceman's injuries were not compensable under the FTCA by reason of Feres, neither could a third party receive indirectly from the Government what the serviceman could not recover in the first place. Id at 673.

B. Petitioner's Claim.

In determining whether Brooks or Feres applies to the present case, it can be seen that the only factual distinction between the situation of the servicemen in Brooks and that of Sergeant Johnson here is that the negligent acts on the part of the Government in Sergeant Johnson's case (negligently ordering him released on leave) occurred on the premises of a military installation just prior to his being released therefrom on leave.

What significance then as far as the application of Feres or Brooks is concerned is this separation of negligent acts while on duty and on base, from the resulting injury while off duty and off base? The Fifth Circuit has addressed this question in a similar context--that of determining when a claim arises under the FTCA. United States v. Reid, 251 F.2d 691 (5th Cir. 1958).

> The question concerns the time a "claim accrues" under Section 2401 of the F.T.C.A. for negligent medical advice and treatment resulting later in advanced tuberculosis.
>
> . . .
>
> Ordinarily there is a coincidence of negligent act and the fact of some damage. Where that occurs the cause of action comes into being and the applicable statute of limitations begins to run even though the ultimate damage is unknown or unpredictable. But it is not the wrongful, i.e., negligent act, which gives rise to the claim. For there must be damage caused by it. Until there is some damage, there is no claim. . .
>
> . . .

> Here, amidst all the medico-legal conceptual uncertainty, we know one thing positively. We know that immediately upon Dr. Lowe's giving Reid the wrong advice, no harm from it had yet befallen Reid. All that occurred was that Reid heard words - words which were wrong and negligently spoken - but without injurious consequences of any kind at the moment.
>
> . . .
>
> . . . consequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves. Id. at 692-95.

Therefore, applying Judge Brown's reasoning in the Reid case to the facts of the instant case, it is clear that Brooks and not Feres controls in this situation, since like the servicemen in Brooks, Sergeant Johnson's injuries (and hence plaintiff's claim) arose while on leave in circumstances totally unrelated to his connection with the military service.

The suit here is upon a claim which arose not while the claimant's husband

was acting under orders (as specifically noted in Feres) or was on the military base, or was engaged in any activity incident to his military service, but the claim arose while the claimant's husband was on leave subject to no orders and not on a military base. Therefore the reasons for application of the Feres doctrine enunciated in Stencel Aero Engineering Corp. v. United States, supra, are no more applicable to petitioner's claim than to the serviceman in Brooks since "a [serviceman's] relationship while on leave [is] not analogous to that of a soldier injured while performing duties under orders." Feres v. United States, 340 U.S. at 146.

Finally, this Writ of Certiorari is urgently desirable in order to settle once and for all the all-inclusive parameters of the FTCA. The Court should and will undoubtedly take judicial notice

of the urgent need at this particular time in our history to attract and retain competent people in the Armed Forces to maintain our defensive strength. To allow the instant Fifth Circuit decision to stand unreversed would serve just the opposite purpose. It would indicate that military men are discriminated against in instances such as this. The record shows, and it was recognized by the court below, that the widow of the brother-in-law and the widow of the soldier have both recovered judgments for the damage done to them by the soldier in killing the brother-in-law and in shooting his widow (whom he left for dead) before committing suicide. To deny recovery to the deceased soldier's widow and children solely because he was a soldier in the service of his country would (under the identically same facts) penalize the soldier's family unjustly. Surely this

result must not be allowed to stand in the face of the purpose of the FTCA, its statutory language, its structure, and its history, i.e., the FTCA is a remedial statute, not a punitive one. Such a result is contrary to Brooks or any language in any previous decision of the Supreme Court of the United States, including the express language of the holding of Feres itself which latter case was erroneously applied by the Fifth Circuit Court of Appeals. For all these reasons a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served true and correct copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, by mail, by depositing the same in a United States mail box, with first class postage prepaid, addressed to each of the following, who constitute all counsel of record:

Solicitor General
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Washington, D. C. 20530
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The Hon. Gary L. Betz
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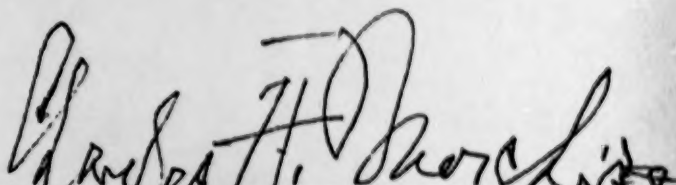
This 3rd day of April, 1981. All parties required to be served have been served.



Charles H. Murchison

APPENDIX

APPENDIX A

JOHNSON v. UNITED STATES

Nora Faye JOHNSON,
Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 79-1485.

United States Court of Appeals,
Fifth Circuit.

Nov. 17, 1980.

Widow of a mentally ill army sergeant who committed suicide after shooting his wife and killing his brother-in-law brought action against the United States under Federal Tort Claims Act for, inter alia, sergeant's wrongful death. The United States District Court for the Middle District of Florida, 409 F.Supp. 1283, George C. Carr, J., denied recovery on the wrongful death claim, and widow appealed. The Court of Appeals, 576 F.2d 606, reversed and remanded. Thereafter district court dis-

missed the wrongful death action, and widow again appealed. The Court of Appeals, Henderson, Circuit Judge, held that decedent's widow could not recover under Federal Tort Claims Act for death of her husband-serviceman, who killed himself and another after being released from army hospital by army psychiatrist who had concluded that decedent was suffering from a severe psychosis accompanied by homicidal and suicidal tendencies.

Judgment of district court affirmed.

United States [Key No.] 78(16)

Decedent's widow could not recover under Federal Tort Claims Act for death of her husband-serviceman, who killed himself and another after being released from army hospital by army psychiatrist who had concluded

that decedent was suffering from a severe psychosis accompanied by homicidal and suicidal tendencies. 28 U.S.C.A. § 2671 et seq.

Appeal from the United States District Court for the Middle District of Florida.

Before KRAVITCH, HENDERSON and REAVLEY, Circuit Judges.

HENDERSON, Circuit Judge.

This is one of three suits stemming from the homicidal rampage of Sgt. Jimmy Ray Johnson. On this appeal we hold that Mrs. Johnson may not recover damages under the Federal Tort Claims Act for her husband's death.

In 1970 Sgt. Johnson was assigned to Fort Stewart, Georgia. In September of that year, Major Merideth, a psychiatrist at Fort Stewart, hospitalized him for a possible mental illness, and con-

cluded he was suffering from a severe psychosis accompanied by homicidal and suicidal tendencies. Early in January, 1971 the sergeant was jailed on a warrant issued after he assaulted his wife. He was released on condition that he reenter the post hospital, and he did so on January 11, 1971. Major Merideth discharged the sergeant on January 21, 1971, even though he knew of his violent tendencies.

On January 25, 1971, Johnson requested leave, which was denied by his captain for fear he would cause more trouble. Unfortunately, the battalion executive officer overruled the captain and granted the leave. On January 27, 1971, Sgt. Johnson went to the home of his wife's brother in Waynesville, Georgia, approximately 80 miles from Fort Stewart. When he arrived he

killed his brother-in-law, Carroll Johns, shot his wife and then killed himself.[1]

Carroll Johns' widow brought suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C.A. §§ 2671 et seq. to recover for the wrongful death of her husband. Mrs. Johns alleged that the government was negligent in releasing Sgt. Johnson from the hospital and granting him leave. A bench trial resulted in a judgment in her favor. Johns v. United States, Civ. Action No. 769 (S.D. Ga., August 6, 1973). Meanwhile, Mrs. Johnson filed two suits against the government, both under the FTCA; one for her own injuries and one for the wrongful death of her husband. In the first appeal of these cases, a panel of this court held that

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1. The facts are set out more fully in the opinion from the previous appeal of this case. Johnson v. United States, 576 F.2d 606 (5th Cir. 1978).

the judgment in Johns was res judicata of the negligence issue in Mrs. Johnson's actions (i. e., the government was negligent in releasing Sgt. Johnson). Johnson v. United States, 576 F.2d 606 (5th Cir. 1978). The United States accordingly stipulated negligence and that this negligence was the proximate cause of the shootings. Mrs. Johnson now appeals from the subsequent order dismissing the wrongful death action.[2] We affirm.

The FTCA provides that the United States shall be liable for tort claims 'in the same manner and to the same extent as a private individual under like circumstances.' 28 U.S.C.A. § 2674. In Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), the

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2. In the companion case Mrs. Johnson recovered for her own injuries. That case is not now before us.

Court enunciated what has come to be known as the Feres doctrine, holding that the United States 'is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.' 340 U.S. at 146, 71 S.Ct. at 159, 95 L.Ed. at 161. The Court, disposing of three cases, held there could be no recovery for injuries resulting from a barracks fire or the negligence of army surgeons.

The Supreme Court affirmed the vitality of Feres in Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 52 L.Ed.2d 665, 97 S.Ct. 2054 (1977). Stencel grew out of injuries sustained when a National Guardsman's life-support system malfunctioned during a flight emergency. The airman sued the manufacturer, Stencel, which sought in-

demnification against the United States for damages it might incur as a result of the incident. In determining whether the 'well-established doctrine of Feres' controlled the case the Court looked to its rationale, 431 U.S. at 670, 97 S.Ct. at 2057, 52 L.Ed.2d at 669, and found that three considerations explained the decision: First, '[t]he relationship between the Government and members of its Armed Forces is "distinctively federal in character," ' 431 U.S. at 671, 97 S.Ct. at 2058, 52 L.Ed. at 670 (quoting Feres), and therefore should not be governed by state law (as are FTCA claims). Second, veterans benefits are the generous but exclusive remedy for injured soldiers. Third, in some cases immunity is necessary because of '[t]he peculiar and special relationship of a soldier to his

'superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.' 431 U.S. at 671—672, 97 S.Ct. at 2058, 52 L.Ed.2d at 670 (quoting Brown).

Viewing our situation in the light of Feres, as elucidated in Stencel, we believe that an FTCA recovery is barred. To the extent Sgt. Johnson's death is attributable to release from the hospital, the courts have consistently followed Feres and held that the medical care given servicemen in army hospitals is so entwined with the military relationship that a serviceman cannot bring an action under the FTCA for the negligent provision thereof.

Veillette v. United States, 615 F.2d 505 (9th Cir. 1980); Henning v. United States, 446 F.2d 774 (3d Cir. 1971), cert. denied, 404 U.S. 1016, 92 S.Ct. 676, 30 L.Ed.2d 664 (1972); Shults v. United States, 421 F.2d 170 (5th Cir. 1969). But cf. Bankston v. United States, 480 F.2d 495 (5th Cir. 1973) (jury issue on discharge at time of negligence). As to negligence of the executive officer in granting Sgt. Johnson leave, there is surely no parallel in civilian life. To second-guess the decisions of officers in granting leave would interfere with 'the peculiar and special relationship of the soldier to is [sic] superiors,' Brown, 348 U.S. at 112, 75 S.Ct. at 142, 99 L.Ed. at 143, and 'visit the Government with novel and unprecedented liabilities,' Feres, 340 U.S. at 142,

71 S.Ct. at 157, 95 L.Ed. at 159.

Mrs. Johnson insists that there are situations where the government is responsible in an FTCA action for injuries incurred by a serviceman. While her contention is undoubtedly true, it will not avail her in this case. In Brooks v. United States, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949), the Court held there was an FTCA action for injuries sustained by two off-duty soldiers who were driving in a private vehicle on a public highway when they collided with a military truck. Brooks stands only for the proposition that servicemen can recover for injuries from 'an accident which had nothing to do with [their] army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired.'

337 U.S. at 52, 69 S.Ct. at 920, 93 L.Ed. at 1204. The Court explicitly refrained from deciding whether 'an army surgeon's slip of hand' would be actionable, 337 U.S. at 52, 69 S.Ct. at 920, 93 L.Ed. at 1204; a reservation the Court noted and addressed in Feres, 340 U.S. at 137—138, 71 S.Ct. at 155, 95 L.Ed. at 156.

United States v. Brown, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954), the second case cited by the appellant, is inapposite because there the injury occurred after the termination of the plaintiff's military service. Brown was a veteran who sought to recover for negligent knee surgery performed in a Veterans Administration hospital. The Court concluded the case was 'governed by Brooks, not by Feres. The injury for which suit was brought was not in-

'curred while respondent was on active duty or subject to military discipline. The injury occurred after his discharge, while he enjoyed a civilian status.' 348 U.S. at 112, 75 S.Ct. at 143, 99 L.Ed. at 143.

Mrs. Johnson's reliance on Parker v. United States, 611 F.2d 1007 (5th Cir. 1980), is similarly misplaced. In Parker the court held that Feres did not preclude a serviceman's widow from recovering under the FTCA for her husband's wrongful death. The decedent, who was off duty and beginning leave, suffered fatal injuries when he was hit by a military vehicle while driving home in his private automobile. Denial of recovery to Mrs. Johnson for her husband's death is entirely consistent with Parker.

In Parker, as in Brown and Brooks,

the soldier's injuries were not in any meaningful sense the result of his military service. Recovery was virtually mandated by Brooks, where, it will be recalled, soldiers were able to recover for injuries sustained in an off-base collision with a military vehicle. In Parker the injury occurred on base, however, and the court explained that this distinction was irrelevant, despite the fact that '[i]f the injury occurs on the base, it is more likely that the injured service member was engaged in activity incident to service.' 611 F.2d at 1014. Accordingly, the court focused on the injured serviceman's duty status; not because it was dispositive (it was not, Woodside v. United States, 606 F.2d 134 (6th Cir. 1979), cert. denied, 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320

(1980))but to show that his death—to use the appellant's own words—'had no significant link to the armed forces and was remote to his military service, thereby rendering the Feres doctrine inapplicable.' In this case, unlike Parker, all the government actions that resulted in Sgt. Johnson's death were directly, and substantially, related to his military service. Although the damage did not manifest itself until Johnson left the post, the negligent acts were incident to his service.

We conclude then that there can be no FTCA recovery for Sgt. Johnson's death. While at first blush this result may seem harsh, we note that Mrs. Johnson and her brother's family have recovered for their injuries, at least so much as they can be compensated. Upon further reflection we are satis-

fied that the sad outcome of this affair is not attributable to the law, but simply stems from the mad acts of a tormented man, which, as is all too often the case, caused everlasting grief to those closest to him.

The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 71-922-Civ-J-C

NORA FAYE JOHNSON,

Plaintiff,

-vs-

UNITED STATES OF AMERICA,

Defendant.
_____/

MEMORANDUM OPINION

The Court has for consideration the Defendant's Motion to Dismiss filed August 15, 1974.[1] The principal issue addressed by the Motion is whether the Plaintiff's cause of action against the Defendant pursuant to Federal Tort Claims Act[2] is barred

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1. Johnson v. U.S.A., No. 71-922-Civ-J-C. (M.D. Fla. filed Nov. 16, 1971).

2. 28 U.S.C. §2671, et seq.

by the Feres doctrine.[3] Basically, the Feres doctrine is a judicially created exception to recovery under the Federal Tort Claims Act for "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[4]

FACTUAL BACKGROUND

A brief review of the factual background and procedural history of the instant case and the companion cases will assist in the consideration of the Feres issue.

On January 27, 1971, Sergeant Jimmy Ray Johnson shot and killed his brother-in-law, Carroll Johns, shot his wife, Nora Faye Johnson, the

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3. Feres v. United States, 340 U.S. 135 (1950).

4. Id. at 146.

Plaintiff in this case, and then killed himself. At the time of the shooting, Sergeant Johnson was in active service in the United States Army stationed at Fort Stewart, Georgia, approximately eighty miles from Waynesville, Georgia, the site of the shootings. Prior to leaving Fort Stewart, Sergeant Johnson had requested a short duration leave from his commanding officer so that he could visit his family in an attempt to "straighten out his domestic affairs."[5] After being denied leave by his company commander, Captain Copeland, Sergeant Johnson then appealed to his battalion commander, Major Peterson. Major Peterson, after consultation with an army

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5. Johns v. U.S.A., Mem.Op., No. 769 at 8 (S.D. Ga., Aug. 2, 1973).

psychiatrist who had been treating Sergeant Johnson, decided to grant the leave.

Soon after the shootings occured [sic], three different law suits were commenced:

> 1) Agnes Jacobs Johns, the wife of Caroll [sic] Johns and the sister-in-law of Nora Faye Johnson, filed a Federal Tort Claims action for the wrongful death of her husband due to the negligence of the United States. This action was brought in the United States District Court in the Southern District of Georgia.[6]
>
> 2) Nora Faye Johnson filed a Federal Tort Action in the United States District Court in the

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6. Civil Action No. 769, United States District Court for the Southern District of Georgia; Waycross Division.

Middle District of Florida for the injuries and disabilities she had received from the shooting.[9][sic]

3) In the instant case, Nora Faye Johnson commenced a second suit against the United States pursuant to the Federal Tort Claims Act for the wrongful death of her husband, Sergeant Johnson. This action was also brought in the Middle District of Florida.[8]

All three suits alleged the negligence of the United States through its agents and employees in treatment and the release of Sergeant Johnson.

After a bench trial in the first case, the Honorable Anthony Alaimo

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7. Johnson v. U.S.A., No.71-921-Civ-J-C (M.D. Fla., filed Nov. 16, 1971)
8. Johnson v. U.S.A., No.71-922-Civ-J-C (M.D. Fla., filed Nov. 16, 1971)

found in August, 1973, that the negligence of the United States in treatment and release of Sergeant Johnson was the proximate cause of the death of Carroll Johns. Judge Alaimo awarded $350,000 damages to Mrs. Johns and her five children.[9]

In September, 1974, a bench trial commenced in the trial of the second and third cases after the Honorable Gerald Tjoflat found that Judge Alaimo's decision on the question of liability in the Southern District of Georgia should not be afforded res judicata or collateral estoppel effect. Prior to the commencement of trial, both parties had briefed and argued the application of the Feres doctrine to the third case.

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9. Johns v. U.S.A., supra, note 5 at 11

The Court took the motion under advisement pending the decision on the question of negligence. Judge Tjoflat in March, 1976, in a Memorandum Opinion, held that the Defendant, United States of America, was neither negligent in providing medical treatment to Sergeant Johnson nor in its decision to permit Johnson to leave the base and visit his family. Having found that the United States was not liable because there was no negligence, Judge Tjoflat was not required to render a decision on the Feres doctrine. On appeal, the Fifth Circuit Court of Appeals reversed and found that "since federal principles of collateral estoppel applied, the United States was precluded from relitigating issues essential to the prior judgments."[10] Thus, in the

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10. Johnson v. U.S.A., 576 F.2d 606 (5th Cir. 1978).

instant action, the Defendant has re-asserted the applicability of the Feres doctrine to bar recovery by the Plaintiff.

FERES DOCTRINE

The basic contours of the Feres doctrine were established soon after the passage of the Federal Tort Claims Act in three Supreme Court decisions: United States v. Brown, 348 U.S. 110 (1954); Feres v. United States, 340 U.S. 136 (1950); Brooks v. United States, 337 U.S. 50 (1948). In Brown, the Plaintiff sued the government for injuries to his left knee caused by the negligence of the attending physicians at a veterans' hospital. Although the plaintiff had been discharged from the army because of an injury to his left knee, the Court found that there was a supervening

negligent act which did not arise out of or in the course of his active military duty. For that reason, the Court permitted the suit to go forward.

In Feres, the Supreme Court decided three cases involving injuries to active duty servicemen. The first case involved the death of a serviceman in a fire in which the barracks involved were alleged to have been negligently heated. The second two cases involved the injuries to active duty servicemen because of the alleged medical malpractice by army physicians. In addressing the question of whether the government should be immune from suits in which servicemen while on active duty sustained injury due to the negligence of other persons in the armed forces, the Supreme Court focused on whether the "injuries arise

"out of or are in the course of activity incident to service."[11] In the three cases subsumed within Feres, the Court found that the government should not be held liable under the Federal Tort Claims Act.

In Brooks, the Supreme Court was presented with a case in which there was an automobile accident which did not occur on a military installation. The driver of the vehicle at fault was a civilian employee of the Army who was engaged in his work at the time of the accident and driving an army truck. Two of the three people riding in the automobile hit by the truck were in the Army although they were on leave. The government on appeal urged the Supreme Court to re-

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11. Feres, supra, at 146.

verse the finding of liability and judgment against the United States because of the relationship between the army plaintiffs and the government. The Supreme Court in upholding the judgment against the government found:

> "But we are dealing with an accident which had nothing to do with the Brooks' army career, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented. [12]

Thus, Brooks, Feres and Brown provide the parameters for consideration of whether the United States should be held liable in certain situations involving governmental negligence and servicemen. The cases

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12. Brooks, supra, at 52.

indicate that the determination is not dependent on any one factor, but upon a multiplicity of factual determinations. Prominent among the Determinations is whether or not the injury arose out of or in the course of activity incident to service. An additional consideration involves whether or not the injured person was in active service, on leave, discharged, or a veteran. Finally, the Court must determine the exact nexus of the negligence to the injury in terms of proximity of time, place and causation.

APPLICATION OF FERES AND BROOKS

Although the Feres doctrine has been applied on numerous occasions, the Court has yet to find a decision with facts which directly parallel

those in the instant case. The archetypal Feres doctrine case involves an on-base, service related negligent act and simultaneous injury to a serviceman on active duty. Antipodally, the archetypal Brooks doctrine case involves an ex-serviceman who after discharge or while on terminal leave is injured in an activity totally unrelated to his service responsibilities or the duties owed to him.

Since the principal case falls between the interstices of Feres and Brooks, close scrutiny must be given to the facts. Sergeant Jimmy Ray Johnson enlisted in the United States Army on August 6, 1966 and remained on active duty until his death on January 27, 1971. During the summer of 1970, Johnson developed severe

psychiatric problems and was treated by Major Charles Merideth, an Army psychiatrist at Fort Stewart. From August, 1970 until his death, Johnson was treated by Dr. Merideth who had diagnosed Johnson as a paranoid schizophrenic with suicidal and homocidal tendencies. Although Johnson occasionally showed signs of progress during this period, his condition remained fairly constant. On January 11, 1971 Johnson was hospitalized by Dr. Merideth because of a worsening of his psychotic state. On January 21, 1971, he was discharged from the hospital without restriction of his movement or special supervision. On January 25, 1971 after an initial request for leave had been denied by his immediate superior, Johnson requested and was granted a

short duration leave from Major Peterson, the Battalion Executive Officer. Johnson's suicide occurred two days later while he was on leave in Waynesville, Georgia.

A stipulation entered into by the parties and filed with the Court makes several findings regarding the negligence of the defendant's agents and employees.[13] The stipulation finds that both Major Merideth and Major Peterson were negligent in the handling of Sergeant Johnson in January, 1971 and that their negligence was the direct and proximate result of his death. Specifically, the stipulation finds that Major Merideth was negligent in his premature discharge of Sergeant

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13. The complete stipulation on the issues of negligence and proximate cause is attached as an appendix to this opinion

Johnson from the base hospital and his failure to continue close supervision of Johnson and to restrict him to on-base activities. The stipulation further finds that Major Peterson was negligent in releasing Sergeant Johnson since he was apprised of his medical condition. Thus, the operative negligence occured [sic] while Johnson was on base in active duty. Further, the Johnson suicide directly resulted from the negligent orders of his two superior officers who owed a duty to supervise and care for Johnson because of his special medical problems, but who breached that duty. While there is no doubt concerning the fact that Sergeant Johnson was on leave and off base at the time of the suicide, those facts alone do not necessarily remove the case from

the application of Feres.

In synthesizing the rationale for the Feres decision, the Supreme Court in U.S. v. Brown, 348 U.S. 111 (1954), stated,

> The peculiar and special relationship of a soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character. Id. at 112.

Brown considered the injury to an ex-serviceman which occurred because of the negligence of a physician in a veterans' hospital. In attempting to apply the relevant standard (i.e., whether the injuries arise out of or in the course of activity incident to military service), the Supreme Court focused on the status of the service-

man and his relationship to the armed service at the time of the negligent act.

> We adhere also to the line drawn in the Feres case between injuries that did and injuries that did not arise out of or in the course of military duty. Since the negligent act giving rise to the injury in the present case was not incident to military service, the Brooks case governs and the judgment must be official. Id. at 113 (emphasis added).

Although the typical accident involves simultaneous negligence and injury, the Courts which have addressed cases involving separated negligence and injury have followed Brown and focused on the negligence elements for a discussion of the Feres doctrine. In Henning v. U.S., 446 F.2d 774 (3d Cir. 1971), the Third Circuit addressed the question of whether Feres applied to the negligence of an army physician in misreading an x-ray. The plaintiff in Henning had been inducted into the army in 1961 and

his x-rays at that time showed his lungs and chest were normal. A 1963 army x-ray which was misread showed the plaintiff possessed moderately active tuberculosis in the right upper lobe. The report on his lungs prepared by the army doctors failed to indicate the presence of the tubercular condition.[14] In attempting to escape the application of Feres, the plaintiff argued the injury caused by the misreading occurred after discharge. In rejecting the plaintiff's argument, the Third Circuit held,

> This argument is erroneous for Feres does not limit its holding to injuries occurring in the course of activity incident to service. It also immunizes the Government for injuries arising out of activity incident to service. We think that Feres focuses not upon when the injury occurs or when the claim becomes actionable, but rather the time

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14. Henning v. U.S., 446 F.2d 774, 775 (3d Cir. 1971)

> of and the circumstances surrounding the neglegent [sic] act... . The focus is thus upon when and how the neglegent [sic] act occurs.[15]

CONCLUSION

Both the rationale which created the Feres exception and the standard for differentiating cases to be governed by Feres or Brooks indicate to the Court that the facts of this case should be controlled by Feres. Because the injury to Sergeant Johnson was self-inflicted and because he was off base and on leave, there is a tendency to overlook the obvious nexus between the injury and the negligence. The fact that most cases presenting these issues involve simultaneous negligence and injury caused directly by service personnel should not obscure the rationale behind the

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15. Id. at 777.

application of Feres in the instant case.

The Government's negligence in treating and releasing Sergeant Johnson is a stipulated matter of fact. The question of proximate cause is undisputely resolved. Without the negligent acts of improper treatment and release, Sergeant Johnson would never have been able to affect his own death. Thus, when the Government's negligence involved not only improper medical treatment to an active duty serviceman while on base, but also his release, the Court is of the opinion that the location of the injury and serviceman's leave status should be discounted in reaching a decision as to the application of Brooks or Feres. Proper focus for the application of the exception in the instant case should be directed to Sergeant Johnson's status at the time the negli-

gent actions took place. Because Johnson was on active duty at Fort Stewart, Georgia at the time the negligent actions and orders from his superior took place, the Court is convinced that Feres should apply.

Accordingly, the defendant's motion to dismiss should be granted.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 18th day of January, 1979.

/s/ George C. Carr
United States District Judge

Copies to:

Ernst D. Mueller, Esquire
Assistant U. S. Attorney

Gary B. Tullis, Esquire

APPENDIX C

UNITED STATES COURT OF APPEALS

Fifth Circuit
Office of the Clerk

January 6, 1981

Gilbert F. Ganucheau
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, LA 70130

TO ALL PARTIES LISTED BELOW:

No: 79-1485 -

NORA FAYE JOHNSON -vs- USA.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure;

Local Fifth Circuit Rule 16), the petition ( ) for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Local Rule 17 for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By /s/ Rosalie C. Varino
Deputy Clerk

/rcv

Messrs. Gary B. Tullis &
Charles H. Murchison
Mr. Ernst D. Mueller

Office Supreme Court, U.S.
FILED
MAY 6 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1678

In the Supreme Court of the United States

OCTOBER TERM, 1980

NORA FAYE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Brooks v. *United States*, 337 U.S. 49 4

Feres v. *United States*, 340 U.S. 135 ..... 3, 4, 5

Harten v. *Coons*, 502 F. 2d 1363 5

Henning v. *United States*, 446 F. 2d 774 ..... 3, 5

Jefferson v. *United States*, 340 U.S. 135 5

Johns v. *United States*, civ. No. 769 (S.D. Ga. Aug. 6, 1973) 2

Shults v. *United States*, 421 F. 2d 170 5

Stencel Aero Engineering Corp. v. *United States*, 431 U.S. 666 ..... 4, 5

Torres v. *United States*, 621 F. 2d 30 3

United States v. *Brown*, 348 U.S. 110 4

Veillette v. *United States*, 615 F. 2d 505 5

Statute:

Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* 2

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1678

NORA FAYE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the United States may be held liable under the Federal Tort Claims Act for the wrongful death of a military serviceman who committed suicide while on leave, on the theory that government personnel were negligent in releasing the serviceman from the post hospital and granting him leave.

1. Petitioner is the widow of Jimmy Ray Johnson, a sergeant in the United States Army who committed suicide on January 27, 1971. Four months prior to his death, Sgt. Johnson had been diagnosed by an Army psychiatrist as "suffering from a severe psychosis accompanied by homicidal and suicidal tendencies" (Pet. App. 4A). Early in January 1971, Sgt. Johnson was jailed for assaulting petitioner, although he subsequently was released on the condition that he enter the post hospital (*ibid.*). Sgt. Johnson entered the post hospital on January 11, 1971, but he was discharged from the hospital ten days later. On January 25,

1971, he requested leave (*ibid.*). After consulting with the Army psychiatrist who had been treating Sgt. Johnson (Pet. App. 3B-4B), the battalion executive officer granted this request, reversing the decision of Sgt. Johnson's captain who had feared further disturbances should he be granted leave (*ibid.*). Sgt. Johnson then proceeded to the home of petitioner's brother, where he killed his brother-in-law, Carroll Johns, shot petitioner, and then killed himself (Pet. App. 4A-5A).

Three lawsuits were filed against the United States under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, as a result of this incident. Carroll Johns' widow brought suit in the United States District Court for the Southern District of Georgia for the wrongful death of her husband, alleging that the government had been negligent in releasing Sgt. Johnson from the hospital and in granting him leave (Pet. App. 5A). Petitioner filed two suits, one for her own injuries and one for the wrongful death of Sgt. Johnson, in the United States District Court for the Middle District of Florida (*ibid.*). A trial in the suit brought by Mrs. Johns resulted in a judgment adverse to the government. *Johns* v. *United States*, Civ. No. 769 (S.D. Ga. Aug. 6, 1973). The Fifth Circuit subsequently held that this judgment collaterally estopped the government from denying its negligence in the suits brought by petitioner and therefore reversed a judgment in favor of the government based on a finding that government personnel had not been negligent. *Johnson* v. *United States*, 576 F. 2d 606 (1978).

In light of this holding, the government stipulated in both of the suits brought by petitioner that it had been negligent in releasing Sgt. Johnson and that this negligence was the proximate cause of the shootings (Pet. App. 6A). A judgment in favor of petitioner was thereafter entered in the suit to recover for her own injuries (Pet. App. 6A n.2). However, in the suit for the wrongful death of Sgt. Johnson, the case presented here, the district court held that petitioner's claim

was barred by this Court's decision in *Feres* v. *United States*, 340 U.S. 135 (1950). See Pet. App. 1B-22B. The court of appeals affirmed, holding that because "all the government actions that resulted in Sgt. Johnson's death were directly, and substantially, related to his military service * * * there can be no FTCA recovery * * *" (Pet. App. 15A).

2. The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

In *Feres* v. *United States, supra*, this Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service" (340 U.S. at 146). Petitioner contends (Pet. 17) that the court of appeals erred in concluding that *Feres* governs the resolution of this case because "Sergeant Johnson's *injuries* (and hence plaintiff's claim) arose while on leave * * *" (emphasis in original). This contention is without merit, for the holding in *Feres* is not limited to injuries that actually occur in the course of activity incident to service; that decision also bars governmental liability for injuries that "arise out of" activity incident to service.[1] The court below specifically held that "all the government actions that resulted in Sgt. Johnson's death were directly, and substantially, related to his military service" (Pet. App. 15A). Indeed, petitioner acknowledges (Pet. 15) that the negligent governmental acts upon

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[1] In addition to the court below, the Third and First Circuits have had occasion to rely upon the "arise out of" language in *Feres* in holding that the government is not liable for injuries that occur in a non-service context but are caused by activity that was incident to service. See *Henning* v. *United States*, 446 F. 2d 774, 777 (3d Cir. 1971) ("We think that *Feres* focuses not upon when the injury occurs or when the claim becomes actionable, but rather the time of, and the circumstances surrounding the negligent act."); *Torres* v. *United States*, 621 F. 2d 30 (1st Cir. 1980).

which her claim is based—the release of Sgt. Johnson from the post hospital and the grant of leave—occurred while he was on duty.

Petitioner's reliance upon *Brooks* v. *United States*, 337 U.S. 49 (1949), is misplaced. *Brooks* simply held that the government could be held liable for "an accident which had nothing to do" with a serviceman's military activities and for "injuries not caused by" his service (337 U.S. at 52)—in that case, injuries sustained by an off-duty serviceman in an automobile collision with another vehicle that happened to be an Army truck. In *Brooks*, then, the fact that the person injured was a serviceman was a mere fortuity, having no relation to the government's negligent acts. In the present case, in contrast, the government personnel engaged in the acts in question only because of Sgt. Johnson's military status. This Court has reconciled *Brooks* and *Feres* by observing that a "line [is to be] drawn * * * between injuries that did and injuries that did not arise out of or in the course of military duty." *United States* v. *Brown*, 348 U.S. 110, 113 (1954). Where, as here, "the negligent act giving rise to the injury * * * was * * * incident to the military service" (*ibid.*), *Feres* rather than *Brooks* controls.

Petitioner's argument (Pet. 16-17) that the claim in this case did not accrue for statute of limitations purposes until Sgt. Johnson was on leave is wholly beside the point. The *Feres* doctrine is based upon the relationship out of which a claim arises, see *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 671-672 (1977), and all of the negligent acts charged against the government in this case occurred in the context of Sgt. Johnson's military service. To the extent that petitioner's claim is based upon governmental negligence in releasing Sgt. Johnson from the post hospital (Pet. App. 9A), it is barred by the consistent line of authority holding that the medical care given servicemen in military hospitals is entwined with the military relationship. See,

e.g., Veillette v. *United States*, 615 F. 2d 505 (9th Cir. 1980); *Harten* v. *Coons*, 502 F. 2d 1363 (10th Cir. 1974); *Henning* v. *United States*, 446 F. 2d 774 (3d Cir. 1971); *Shults* v. *United States*, 421 F. 2d 170 (5th Cir. 1969).[2] To the extent that petitioner's claim is based upon governmental negligence in granting Sgt. Johnson leave (Pet. App. 10A), it is barred by the need, consistently recognized by this Court, to prevent "second-guessing military orders" (*Stencel Aero Engineering Corp.* v. *United States, supra*, 431 U.S. at 673) in Tort Claims litigation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1981

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[2]In *Feres*, this Court resolved in the government's favor three cases involving injuries to servicemen, one of which (*Jefferson* v. *United States*, No. 29, 1950 Term) involved a claim for medical malpractice that appears not to have accrued for statute of limitations purposes until after the serviceman's discharge from the Army. 340 U.S. at 137.

NO. 80-1678

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1980

MAY 18 1981

ALEXANDER L. STEVAS,
CLERK

NORA FAYE JOHNSON,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....iii

PETITIONER'S REPLY TO
RESPONDENT'S MEMORANDUM
IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI.....1

CERTIFICATE OF SERVICE.....10

TABLE OF AUTHORITIES

Cases: Page

BROOKS v. UNITED STATES, 337 U.S. 49 (1949)..... 1

FERES v. UNITED STATES, 340 U.S. 135 (1950, 95 L.Ed. 152..... 1, 2

PARKER v. UNITED STATES, 611 F.2d 1007 (1980)..... 5

UNITED STATES v. REID, 251 F.2d 691 (5th Cir. 1958)..... 3, 4

Other Authorities:

FEDERAL TORT CLAIMS ACT, 28 U.S.C. § 1346(b)..... 2

PETITIONER'S REPLY
TO RESPONDENT'S MEMORANDUM
IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

The Department of Justice's memorandum in opposition to the granting of the Petition for Certiorari misses the entire point of the petition; i.e., that the Fifth Circuit opinion construed the Federal Tort Claims Act ("Act") in a way that conflicts with the prior decision of this Court in Brooks v. United States, 337 U.S. 49 (1949). It also erroneously seeks to apply the Feres doctrine by completely overlooking the holding in Feres; i.e.:

> Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under[1]

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[1]Emphasis supplied throughout unless otherwise noted.

orders. Feres v. United States, 340 U.S. 135 (1950), 95 L.Ed. 152.

It ignores the specific wording of the Act which provides:

> ...[T]he district court...'shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages,' accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C., § 1346(b).

It is elementary law that a claim for negligence does not arise until there is some injury. The

Fifth Circuit recognized this fact in an excellent opinion written by Chief Justice Brown on behalf of the Court where it held in United states v. Reid, 251 F.2d 691 (5th Cir. 1958):

> The question concerns the time a 'claim arises' under Section 2401 of the F.T.C.A. for negligent medical advice and treatment resulting later in advanced tuberculosis.
>
> ....
> ...But it is not the wrongful, i.e., negligent act, which gives rise to the claim. For there must be damage caused by it. Until there is some damage, there is no claim....
>
> ....
> ...We know that immediately upon Dr. Lowe's giving Reid the wrong advice, no harm from it had yet befallen Reid. All that occurred was that Reid heard words—words which were wrong and negligently spoken—but without injurious consequences of any kind at the moment.

> ....
> ...[C]onsequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves. Id. at 692-695.

The Government's brief is predicated upon the misconception of the wording and basis of the Act when it says:

> ...To the extent that petitioner's claim is based upon governmental negligence in granting Sgt. Johnson leave (Pet. App. 10A), it is barred by the need, consistently recognized by this Court, to prevent 'second-guessing military orders.' (Stencel Aero Engineering Corp. v. United States, supra, 431 U.S. at 673) in Tort Claims litigation.

Contrary to this position, our Petition for Certiorari is not an attempt to "second-guess military orders." The stipulation that the

employees of the government were negligent does not constitute "second-guessing" anyone. It simply meets and complies with the Act's requirement; i.e., "that an employee of the government acting within the scope of his employment has been negligent." If, by proving this to be true and, therefore, proving that the cause of the resulting injury is by an employee acting in his military capacity bars recovery, then the Act automatically becomes a nullity. This just is not true. Nowhere is it expressed better and more cogently than by the Fifth Circuit decision where it held in the recent case of Parker v. United States, 611 F.2d 1007 (1980):

> ...[S]ervicemen killed in automobile collision on roadway within military reservation did not preclude an action by

survivors under the Federal Tort Claims Act. 28 U.S.C.A. §§ 1346(b), 2671-2680; 38 U.S.C.A. §§ 101(16), 105(a).[2]

....

...In a series of decisions now referred to as the Feres doctrine, the United States Supreme Court implied an exception to the FTCA and held that no action lies for injury to a member of the armed forces whose activity at the time of injury is 'incident to military service.'

....

...The inquiry finally turns to what Parker was doing at the time he was injured. Parker was not directly subject to military control; he was not under the compulsion of military orders; he was not performing any military mission.

....

...Keeping in mind that 'incident' does not mean that a strict 'but for' test applies, we do not find that Parker was

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[2]The driver of the truck who negligently killed Parker was acting in his military capacity just as the others in the instant case were.

engaged in any activity incident to his service.

....

...Whether the exceptions to liability and the FTCA's waiver of sovereign immunity should be read broadly or narrowly are questions that have been answered inconsistently over the thirty-odd years since the statute's enactment.[3]

....

...Parker's four-day right to be absent resembled the furlough in Brooks. Because the collision did not occur off the base, the court should have looked to the function Parker was performing at the time of his death, which was not related to his military service.[4]

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[3]The truth of this statement is borne out by the argument in the Government's brief citing the various treatments given by the various Circuit Courts different from the Parker opinion.

[4]The Court emphasized this same point four (4) times in the course of its opinion, e.g., the inquiry finally turns to what Parker was doing at the time he was injured.

CONCLUSION

In view of the conflicting views expressed by Parker, Henning, Johnson (this case), et al., as to the application of the provisions of the Act, and to prevent further "inconsistencies" in answering questions involving suits by members of the armed forces which have "existed over the thirty-odd years since the statute's enactment" (Parker, supra;) and in view of the fact that the granting of this petition presents an opportunity for the Supreme Court to once and for all enunciate specific guidelines for future decisions involving suits instituted by members of the armed forces, or its beneficiaries under the Act consistent with the purpose of the Act, we respectfully submit that a Writ of Certiorari

should be granted.

Respectfully submitted,

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Counsel of Record
for: Petitioner

CERTIFICATE OF SERVICE

This is to certify that I have this day served true and correct copies of the foregoing Petitioner's Reply to Respondent's Memorandum in Opposition to Petition for Writ of Certiorari, by mail, by depositing the same in a United States mail box, with first class postage prepaid, addressed to each of the following, who constitute all counsel of record:

Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D. C. 20530
Counsel of Record
for: Respondent

The Hon. Gary L. Betz
United States Attorney
Middle District of Florida
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Ernst D. Mueller, Esquire
Assistant United States Atty.
Middle District of Florida
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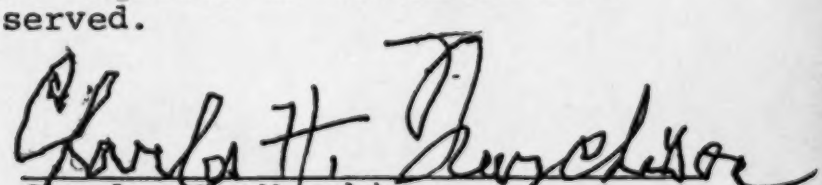
311 W. Monroe Street
Jacksonville, FL 32202

this 15th day of May, 1981. All parties required to be served have been served.



Charles H. Murchison